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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PLUMBERS AND PIPE FITTERS LOCAL UNION NO. 32, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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8 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT 1

CONCLUSION 6

TABLE OF AUTHORITIES

DelCostello v. Teamsters,
462 U.S. 151, 170 (1982) 5

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ARGUMENT

The Board argues that this case involves claims alleging discrimination based on union membership. (Opp. Br. p. 12-13) This argument is disingenuous. It wholly ignores the issues as they were alleged, stipulated, tried and decided.

This case was tried under the theory that Local 32 "failed to dispatch the [charging parties] for arbitrary, capricious and invidious reasons." (R. 5-6)[1] The unfair labor practice complaint alleged that Local 32 operated its hiring hall in an unlawful manner by failing to publish its referral standards. (R. 11) The complaint further alleged that Local 32 "failed in its duty of fair representation." (R. 12) No other unfair labor practice was alleged. (R. 13, 262)

The NLRB General Counsel did not contend that Local 32 "discriminated against [Charging Parties] but rather that the arbitrary nature of the selection process breached the Union's duty of fair representation. . . ." (App. p. 47) Moreover, the parties

1. "R. ___" refers to the joint deferred appendix filed in the court below.

themselves stipulated that discriminatory conduct was neither "intended to be raised by the Complaint, pressed by General Counsel, nor intended by the parties to be litigated. . . ." (App. p. 70)

The parties further stipulated that Local 32 "accumulated the names of individuals who were good at this work, reliable, and did not have drinking or drug-related problems." (App. p. 66) The ALJ found that "the record shows that [Local 32] attempted to refer only qualified and dependable welders. . . ." (App. p. 51) Indeed, the results of the referral system bar any inference that only those who curried favor with Union officials were referred. As the parties stipulated and the ALJ found: (a) two members of Local 32 were dispatched as stewards but did not pass the welding

test. Hence, no "members of [Local 32] worked as welders on the job" (App. p. 46-47, 68); (b) no rig welders from the state of Washington were dispatched (App. p. 47, 68); (c) five rig welders out of the total of the 15 dispatched were from Bakersfield, California Local 460 -- Charging Party Flowers' home local union. (R. 151, 39-342)

The ALJ concluded that Local 32 violated the NLRA by failing to use objective criteria and standards when referring rig welders. (App. p. 56-57) Consistent with the issues litigated, it made no finding regarding discrimination based upon union membership or activity. (App. p. 56-57) The Board affirmed. (App. p. 56)

The court below stated that the Board's General Counsel filed an unfair labor practice complaint "casting the

alleged unfair labor practice as a breach of the duty of fair representation." (App. p. 9-10) The court further stated that the "General Counsel's complaint did not allege specific discrimination in favor of the union's own members or against [the Charging Parties], but 'rather that the arbitrary nature of the selection process breached the Union's duty of fair representation. . . .'" (App. p. 29; citation omitted.) The court enforced the Board's decision. (App. p. 32)

This Court has repeatedly reserved the recurring question of Board jurisdiction over fair representation cases in cases devoid of allegations of discrimination on account of union membership. (See, e.g., DelCostello v. Teamsters, 462 U.S. 151, 170 (1982)) This case squarely presents an "unadorned

fair representation claim." (Pet. Opening Br., p. 12-13) Whether the Board has jurisdiction to adjudicate an alleged breach of the duty of fair representation where, as here, there is no claim of discrimination based on union membership or activity is ripe for review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED this 20th day of October, 1995.

Respectfully submitted,

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